Petition

81-1783

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1982

Richard Hebel and Carlyle Merritt,

Petitioners,

v.

United States of America,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI - CRIMINAL CASE

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QUESTIONS PRESENTED

Did the District Court err in denying the Petitioners' Motion to Dismiss based on selective prosecution by failing to require the Respondent to provide proof that the Petitioners' prosecution was not based upon an impermissible classification after finding that Petitioners had established a strong inference of discriminatory prosecution?

Can a governmental agency establish, by practice, a binding governmental policy?

Did the District Court err in finding that Petitioners had failed to establish a federal governmental practice of nonprosecution in voluntary disclosure income tax cases?

Did the failure of the federal government to give notice of the repudiation of its practice of nonprosecution in voluntary disclosure income tax cases violate the Petitioners' rights to due process of law?

Did the conduct and statements of the United States Justice Department and Internal Revenue Service deny the Petitioners their right to the effective assistance of counsel?

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Opinions Below

The opinion of the Court of Appeals below (Appendix D, infra, p. 1) is a published opinion. The opinion of the District Court below was not reported.

Jurisdictional Grounds in this Court

The judgment of the Court of Appeals below (Appendix D, infra, p. 1) was entered on January 22, 1982. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional & Statutory Provisions

1. The Fourth Amendment, United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The Fifth Amendment, United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. The Sixth Amendment, United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and

> district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

4. The statute under which Petitioner, Richard Hebel, was prosecuted, though nothing turns on its terms, is 26 U.S.C. § 7201, which provided as follows:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more that $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

5. The statute under which Petitioner, Carlyle Merritt, was prosecuted, though nothing turns on its terms, is 26 U.S.C. § 7206, which provides as follows:

> Any person who--
>
> (1) Declaration under penalties of perjury. Willfully makes and subscribes any return, statement,

> or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, or . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

Petitioners, Richard F. Hebel and Carlyle Merritt, were officers and controlling shareholders of Hebel Fertilizer and Chemical, Inc. during the time period 1974, 1975 and 1976. Both individuals timely filed their 1974 and 1975 personal income tax returns.

On or about Friday, November 26, 1976, Richard Hebel and Carlyle Merritt contacted Hebel's family attorney (of longstanding) Edward Boyle, Esquire, and informed him that they were having

trouble with one of the stockholders of Hebel Fertilizer and Chemical, Inc., H. Jerome True, that they had been requested to meet with Mr. True's attorney concerning a potential controversy (the "True controversy") and that they had some other important matters they wished to discuss with Mr. Boyle (Appendix A, p. 7 & 8). Mr. Boyle stated that he would come over to their offices later that morning. Accordingly, Boyle, Hebel and Merritt met at around noon on November 26, 1976 at Hebel Fertilizer Chemical, Inc. offices in Mason City (Appendix A, p. 9). Prior to any discussion on the True controversy, Hebel indicated to Boyle that he felt that some of his previously filed personal and corporate income tax returns were inaccurate. (Appendix A, p. 9).

After hearing a description of some of the tax problems Mr. Boyle stated to Hebel and Merritt that he felt they were "in position to make a voluntary disclosure" (Appendix A, p. 10). When they asked what a voluntary disclosure was, Boyle related (at the evidentiary hearing) that he told them, "Well, as I understand the law - 'and I didn't understand it, I guess,' - that when you make a voluntary disclosure the government hasn't seen fit to prosecute criminally." (Appendix A, pp. 10-11). Either Hebel or Merritt responded "That is the very thing I want to do." (Appendix A, p. 11). Boyle advised Hebel that he was not familiar enough with the tax laws and the tax issues raised in the Petitioners' discussion to give absolute advise and suggested that

he engage counsel familiar with income tax procedures of this type (Stipulation, Defense Exhibit "A" to Appendix A, p. 3). In addition, Hebel informed Boyle that the controversy with True apparently had to do with True feeling he was making enough money and wanting more of a voice in the corporation because he owned stock. Hebel stated that he assumed that that was the basis of the discussion they were going to have with True and his attorney (Appendix A, p. 11).

At approximately 2 o'clock that afternoon the meeting took place at the office of Hebel Fertilizer and Chemical, Inc. attended by the Petitioners, Ed Boyle, a Mr. Ted Enabnit (attorney representing Jerome True) and Mr. Jerome True (Appendix D, p. 11). At the meeting

Ed Boyle was shown a petition drawn by Enabnit on behalf of True (which had not been filed) requesting a substantial sum of money. Boyle asked him how much he would take to settle his claim and Enabnit said they would take two hundred thousand dollars (Appendix A, p. 12). Boyle said he would have to discuss things with his clients and would get back to Enabnit (Appendix A, p. 12).

Mr. Boyle telephoned H. R. Duncan, Esquire, past president of the Iowa Bar Association and requested the names of attorneys experienced in tax matters. That same day Walter Brown and William Sidney Smith, attorneys in Des Moines, Iowa, were contacted by Hebel, Merritt and Boyle about representation in this matter (Exhibit "A", Stipulation of Facts, p. 3, filed with Appendix A).

Hebel and Merritt met with Smith and Brown the following Tuesday, November 30, 1976 and discussed the tax issues involved. Smith and Brown engaged independent accountants at that meeting to assist in the analysis of the possible tax ramifications of the various transactions by and between the Petitioners and Hebel Fertilizer and Chemical, Inc. The following day the Petitioners, Brown, Smith, and Boyle met to review the possible tax ramifications of the transactions as developed by the attorneys and the CPA's during the intervening one day time period (Exhibit "A", Stipulation of Facts, p. 4, filed with Appendix A).

At that meeting, neither the Petitioners nor the attorneys were aware of any examination being commenced by

the Internal Revenue Service or any contacts by the Internal Revenue Service or any contacts by the Internal Revenue Service relating to the federal income tax returns of the individuals involved or of any corporate returns of Hebel Fertilizer and Chemical, Inc. In addition, at this date no lawsuit had been filed by True nor his attorney nor was it inevitable that such a lawsuit would be filed. (Exhibit "A", Stipulation of Facts, p. 4, filed with Appendix A).

The Petitioners requested and relied upon the legal advice of Smith and Brown as to the course of action taken in regard to their previously filed personal and corporate federal income tax returns. Based on those conversations and Brown's understanding of the

long-standing policy of voluntary disclosure by the government, Peitioners were advised to make a voluntary disclosure to the Internal Revenue Service. Relying solely on the advise of counsel, Petitioners concurred in such advice and Laurence Rembold, Chief of Audit Internal Revenue Service in Des Moines, was contacted about an appointment for the following morning (Appendix A p. 131). Mr. Brown would not have allowed the voluntary disclosure to go forward if he had felt that there was any danger the government would take the position that either Merritt or Hebel did not qualify for such voluntary disclosure or if he felt there was any danger that the the government had changed their policy on voluntary disclosure (Appendix A, p. 132).

On the following day, December 2, 1976, Brown, Smith, and Boyle met with representatives of the Internal Revenue Service where they disclosed the identity of the Petitioners and indicated that errors had taken place in their previous personal and corporate tax returns which would be rectified by amended returns as soon as the accountants could complete their analysis. A letter concerning this voluntary disclosure was delivered by hand to the Internal Revenue Service at such meeting (Defense Exhibit "A", Stipulation, p. 5 and Defense Exhibit "F", both filed with the Appendix A). At such meeting with the Internal Revenue Service, the Internal Revenue Service disclosed that the corporate return and Richard Hebel's return had been assigned for audit by

the Internal Revenue Service (routine audit) but that no contact had been made by and between the Internal Revenue Service and Hebel, Merritt, or anyone with Hebel Fertilizer and Chemical, Inc. (Defendants' Exhibit "A", Stipulation, p. 6, filed with Appendix A).

Prior to the end of 1976, amended individual and corporate tax returns were filed for Hebel, Merritt and Hebel Fertilizer and Chemical, Inc. with Internal Revenue Agent Jess Harris, at the request of the Internal Revenue Service (Appendix A, pp. 137 & 138).

Subsequently, at the request of the Internal Revenue Service and pursuant to consent of counsel, the IRS agents involved in the review of the amended returns were given complete access to all of the accountants' work papers, the

business and personal records of Hebel, Merritt and Hebel Fertilizer and Chemical, Inc., as well as interviews of the accountants engaged by the lawyers for this analysis purpose and personal interviews with the Petitioners (Appendix A, pp. 138 & 139). Had Mr. Brown known that the government would not adhere to its policy of non-prosecution in voluntary disclosure cases or that it would retroactively attempt to change such policy, he would never have allowed access to such analysis work, interviews with either of the Petitioners or review of the personal records of Hebel or Merritt (Appendix A, p. 139). The items disclosed and used in the amended returns would not have been discoverable even by the CPA's engaged to analyze such records without

the complete cooperation and assistance of Hebel and Merritt (Stipulation Exhibit "A" to Appendix A p. 7 and Appendix pp. 112 & 113).

Subsequent to this compliance with the government policy of voluntary disclosure and for reasons known only by government officials, the United States Department of Justice referred this case to the United States Attorney for the Northern District of Iowa with directions to prosecute Petitioners based solely on the items disclosed in the previously filed amended returns given to the service pursuant to reliance upon the policy of voluntary disclosure (Stipulation, Defendant's Exhibit "A" to Appendix A).

Hebel and Merritt were subsequently indicted in a seven count indictment as

directed by the Justice Department, and Hebel and Merritt filed Motions to Suppress the evidence obtained from them pursuant to their disclosures as well as a Motion to Dismiss the indictments. Such motions came up for evidentiary hearing on April 22, 1981 wherein the government chose to call no witnesses. Petitioners called as witnesses Edward Boyle and Walter Brown and, in addition, called Stanley L. Drexler, nationally known attorney in the area of federal taxation from Denver, Colorado, Marvin J. Garbis, nationally known tax expert from Baltimore, Maryland, and introduced the deposition of attorney Laurence S. Horn, a nationally known tax attorney from Newark, New Jersey (Appendix A). The Court subsequently denied Hebel and Merritt's Motions to Suppress and

Motions to Dismiss indictments and on May 27, 1981 Hebel and Merritt were tried on counts five and seven respectively of the original indictments and found guilty, with the balance of the counts being dismissed. At such trial Hebel and Merritt objected to the introduction of the affirmative evidence placed into trial as indicated in the trial Stipulation of Facts and Continuance of Objections filed at such trial and the continuing objections to the testimony received from IRS agent Marvin Barlow (Appendix C, pp. 5-6 and 14).

The Court found the Petitioners guilty as charged on July 2, 1981. Sentencing was set for August 18, 1981. Judge McManus fined Petitioner Merritt $5,000.00 and Petitioner Hebel

$10,000.00. Notice of appeal to the Eighth Circuit Court of Appeals was filed on August 25, 1981. Petitioners' cases were consolidated for this appeal.

On January 22, 1982 the Court of Appeals entered a per curiam opinion adopting Magistrate Hodge's findings at the evidentiary hearing on the Motions to Suppress and Dismiss. The Court of Appeals affirmed the convictions of Hebel and Merritt.

REASONS FOR GRANTING THE WRIT

The Petitioners fully realize that a review on writ of certiorari is not a matter of right, but of judicial discretion. However, the Petitioners respectfully submit that there are two compelling, special and important reasons for the granting of a writ in this matter:

A. The federal Court of Appeals for the Eighth Circuit has rendered a decision in this matter which is in direct conflict with the decisions of other federal Courts of Appeal on the same matter.

One of the basis for the Petitioners' Motion to Dismiss was that the singling out of the Petitioners for criminal prosecution after they had a made a full and voluntary disclosure of their tax deficiencies clearly amounted to a violation of the Petitioners' rights under the due process clause and equal protection clause in that the Petitioners were the victims of governmental selective prosecution. In addressing this issue the United States Court of Appeals for the Eighth Circuit held that this basis was without merit. In doing so the Court

stated that in order to prevail on said motions the Petitioners must each have shown "both that he was singled out for prosecution and that the prosecution was based on impermissible grounds" (Appendix D, p. 5, per curium opinion of United States Court of Appeals for the Eighth Circuit). In support of this statement of law the Court cited United States v. Larson, 612 F.2d 1301 (8th Cir. 1980); United States v. Catlett, 584 F.2d 864 (8th Cir. 1978); United States v. Alarik, 439 F.2d 1349 (8th Cir. 1971). By setting forth this standard and placing the burden of proof as to each of the two prongs of this test directly upon the Petitioners' shoulders, the Court of Appeals for the Eighth Circuit is in direct conflict with the United States Court of Appeals for the Ninth Circuit,

the Fourth Circuit, and the Seventh Circuit. The Ninth, Fourth and Seventh Circuit Courts have repeatedly applied the proper standard for a Court's review for selective prosecution. In a situation where the governmental agency has exclusive control over the basis or standards of selection of prosecution, and chooses not to come forth with the disclosure of said basis, the standard must be: once the defendant in the controversy has established a prima facie case of selective prosecution by establishing the first prong of the test (the unique selection of an individual for prosecution) then it is, and must be, the government's burden to at least demonstrate what the standards of selection where or, alternatively, that prosecution was not based upon discriminatory or

unjustifiable standards. Such an approach finds judicial support in the case of United States v. Steele, 461 F.2d 1148 (9th Cir. 1972), where the Court explained:

> Since Steele had presented evidence which created a strong inference of discriminatory prosecution, the government was required to explain it away, if possible, by showing the selection process actually rested upon some valid ground.

At 1152. See, also, United States v. Falk, 479 F.2d 616, 621 (7th Cir. 1973); United States v. Crowthers, 456 F.2d 1074, 1078 (4th Cir. 1972).

In United States v. Alarik, supra at 1350-51 citing, Oyler v. Boles, 368 U.S. 448 (1961); Yick Wo v. Hopkins, 118 U.S. 356 (1886); and United States v. Sacco, 428 F.2d 264 (9th Cir. 1970), the Eighth Circuit Court of Appeals expressed the

constitutional limitations of prosecution by stating, "the law is clear that a prosecutor may exercise discretion in deciding who should be prosecuted as long as he does not deliberately discriminate between persons in similar circumstances based upon an unjustifiable standard such as race, religion, or other arbitrary classification." The Court in Yick Wo, supra at 373-74 indicated that the application of a valid and legal law may be as offensive as an illegal law itself when it stated:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

The unjust discrimination in the present case evolves from the selection of the Petitioners for prosecution while others who have voluntarily disclosed have not been prosecuted. Impermissibility results because the Petitioners have been prosecuted in violation of the government's own previously established prosecution standards.

United States v. Berrios, 501 F.2d 1207, 1211 (2nd Cir. 1974), expressed the elements which the Petitioners here must establish in presenting a case of selective enforcement:

> To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has

> been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as "intentional and purposeful discrimination."

As to the first prong of the test for selective prosecution, that others similarly situated have not generally been proceeded against under similar circumstances, the evidence is clear that both of the Petitioners have been selectively prosecuted. A review of the transcript of the evidentiary hearing (Appendix A) compels the conclusion that the findings of the court that the Petitioners did not prove the existence of practice of nonprosecution in voluntary disclosure cases is not supported by the evidence proffered at the evidentiary hearing and thus is erroneous.

This 24-year practice of nonprosecution on the part of the government in voluntary disclosure cases was clearly established by the uncontroverted testimony of no less than five expert witnesses. These expert witnesses were widely known tax attorneys (three of whom were at one time United States Attorneys involved in criminal tax prosecutions) and accountants from widely diverse geographical locations. These individuals relied not only upon their own personal experiences in dealing with the Internal Revenue Service and the Justice Department in criminal tax situations but also upon their participation, often as speakers, at national tax forums throughout the United States where the government's policy of nonprosecution of voluntary disclosure situa-

tions was a common topic of discussion among the numerous participants as well as the speakers themselves (Appendix A, pp. 33-35, 60-63).

The first expert, Stanley Drexler, Esquire, of Denver, Colorado stated that:

> In my experience in actual practice there has not been a great deal of difference between what happened under the old announced voluntary disclosure policy [1939 - 1952] and the present [policy].

Appendix A, p. 39.

Mr. Drexler in discussing his experience with the voluntary disclosure policy went on to state:

> Q Have you ever recommended voluntary disclosure to any of your clients?
>
> A A great many times.
>
> Q Approximately how often?
>
> A I have been practicing . . . over 25 years . . . in the tax field. . . . I am sure it is several hundred times. . . .

Appendix A, p. 42.

Mr. Drexler also testifed that none of his clients who made a voluntary disclosure had ever been prosecuted. In fact, he stated that, including the experiences of other practitioners with whom he was familiar, he was not aware of any prosecution of a voluntary disclosure case. Appendix A, p. 44. Mr. Drexler went on to state that the subject was a perennial topic in tax institutes and criminal tax forums throughout the United States (which he often attends or speaks at). A common practice is for one of the speakers to ask members of the audience to raise their hand if any of them have ever had a client prosecuted who made a voluntary disclosure. Mr. Drexler was then asked:

> Q In fact do you remember ever a hand going up?

A I don't remember a hand going up.

Appendix A p. 43-44.

Marvin Garbis, Esquire, a recognized expert in the field of civil and criminal tax litigation and a frequent lecturer on the subject (throughout the country) from Baltimore, Maryland, stated:

> Q. Once again, what do you understand the effect to be if you make a voluntary disclosure?
>
> A. My experience, which I suppose goes from 1963 to the present time, is that that will result in there being no prosecution and I have put some conditions on it. A voluntary disclosure is something that simply goes beyond telling the Service, 'I did something wrong.' It means filing accurate [amended] returns and it means cooperating, if that is necessary, in order to determine the correct liability, etc., but having done all that, having filed amended returns or filing returns which may or may not be scrutinized, you would not be prosecuted.
>
> Q. This policy we are talking about, practice, is it in writing at this time?

A. Well, I suppose it is not a written policy as such. In fact, historically, we know they said they unwrote it. So I guess we cannot point to a book or place in which we will find it, but I think we can find it in the common experience of everybody in the field that I know or have heard of but until I heard about this case and some others in the last year or so, we never heard of a voluntary disclosure going forward for prosecution.

Appendix A, pp. 65, 66.

Mr. Garbis also stated that:

I do attend, and I think you have a list, and I do speak at all of these seminars. We discuss constantly the voluntary disclosure situation and the terms that I have described. In all that time, and I would estimate that several thousand practitioners, there was only one instance when any person in the audience ever said or came up to me or anybody else and said, 'I know a case where there was a voluntary disclosure and they prosecuted it.'

Q. Tell us about that case if you know about it.

A. That is this case. . . .

Appendix A, p. 68.

Mr. Garbis stated that after he first heard of this case [Hebel and Merritt] he attempted "to find somebody to tell me about another case. . . . [involving prosecution of a person who had made a voluntary disclosure] Let's say since 1960, in which there has been a voluntary prosecution . . . [and] it is my belief, and I can testify, that I know of no such case." Appendix A, pp. 68-69.

In fact, Mr. Garbis testified that the reliance on the government policy of nonprosecution in voluntary disclosure cases was "common practice" [Appendix A, p. 75] to the point that his firm had form letters to disclose such matters to the IRS and routinely delegated such cases to others in his firm (at least 30 to 40 over the past 10 years without difficulty). Appendix A, p. 76.

In addition, as a result of his general reputation in the tax field, Mr. Garbis is routinely contacted regarding criminal tax issues and has never had any feedback evidencing any prosecution in a voluntary disclosure situation. Appendix A, p. 76.

The next witness was Sidney B. Smith, a CPA practicing in the State of Iowa, specializing in taxation with extensive experience in the criminal tax area. Mr. Smith indicated that he has had similar experiences at the many tax schools and seminars throughout the United States as those of Mr. Drexler and Mr. Garbis. No one had ever heard of a prosecution involving an individual who had made a voluntary disclosure. Appendix A, p. 110. In fact, Mr. Smith testified that when he informed practitioners of the

Hebel-Merritt prosecution at the last Hawaii tax institute (involving tax practitioners from throughout the United States) they reacted with complete surprise. Based on his personal experience as well as the shared experience with practitioners throughout the United States, Mr. Smith was asked about his understanding of the existence of a policy on voluntary disclosure and he replied:

> Q. What do you feel that policy to be, if there is a policy?
>
> A. My conviction was that that policy was this: Someone who had omitted income from a past return or had failed to file a return whatsoever, if he would voluntarily go to the Internal Revenue Service before any examination had commenced or any notification had been received by him of any contemplated investigation of his affairs by the Service had been received, we had a voluntary disclosure from which prosecution would not follow.

Appendix A, p. 109-110.

In addition, Mr. Smith was asked whether in his attendance at various tax schools and in conversations with other tax experts throughout the United States if anything had come up to make him feel that the Government did not follow a policy of nonprosecution in voluntary disclosure situations. He answered, "No". Appendix A, p. 110.

In addition, Hebel and Merritt called as a witness Walter Brown, Esquire, a tax specialist practicing in Des Moines, Iowa since 1949. As with Mr. Drexler and Mr. Garbis, Mr. Brown testified that his practice was primarily directed to the criminal tax area and that he regularly attended national continuing education programs dealing with criminal tax practice. Mr. Brown testified that a policy of non-

prosecution in voluntary disclosure cases is broadly understood to exist in practice and that prosecution of individuals who have made such voluntary disclosure was unheard of by practitioners. Appendix A, pp. 121-122. In addition, Mr. Brown stated:

> Q. Why did you believe, once again, they would not prosecute if they made a voluntary disclosure?
>
> A. Because based upon my observation the voluntary disclosure policy that was ostensibly revoked in, I think it was 1952, in reality just continued right on. It just wasn't my experience that indicated that. It was the experience of taxpayers all over the country. They never prosecuted a true voluntary disclosure case. It just was not done. . . .

Appendix A, p. 132.

Further, in response to cross-examination by the Government Mr. Brown stated:

> . . .I think clearly all of us in practice, in tax practice, knew that this voluntary disclosure practice was continuing on. It is easy

> enough now to sit and talk about some of these little tiny refinements about motivation and a few things like that. But we all knew that it was the IRS's practice, if you got there and disgorged before the taxpayer had knowledge that there was any investigation going on about him that there was no - there was never, in our knowledge, and this was true of the tax bar generally, had there ever been a criminal prosecution. This has been true not only in '76 but it has continued to be true up until about the last year when apparently someone over there in Justice or IRS is seeking to change the practice but they are not standing up and saying, 'We are changing the practice.' but that is what has happened. This is evident in this particular case. Since this case came up, I have been aware of one other case out in Seattle, Washington, but we are - Mr. Reynolds, we are at a loss.

Appendix A, p. 145.

Hebel and Merritt also introduced into evidence at the evidentiary hearing the deposition taken of Attorney Lawrence Horn from Newark, New Jersey. Mr. Horn's practice has been extensively involved with criminal tax defense work

since leaving the Justice Department (where he was involved in tax prosecutions). In his deposition the following dialouge took place:

> Q. Have you ever recommended voluntary disclosures?
>
> A. Yes.
>
> Q. Was the basis of these recommendations, at least in part, your understanding that a true voluntary disclosure would be dispositive of the issue of whether or not they would be criminally prosecuted?
>
> A. I recall my partner and myself advising the clients of what our interpretation of what the policy was and that we inquired whether or not the client knew of any state or federal investigation or any examination of the returns of his 1040's or his corporation's and that was a major factor after being satisfied that the answer to our inquiry were in the negative, meaning that the client was unaware of any investigation either state or federal, tax or non-tax by any state or federal grand jury, that we stated that most likely to our knowledge, you would be safe if you filed truthful and accurate amended returns and paid the tax. . . .

Deposition of Lawrence Horn, Defendants' Exhibit "G", p. 12, Appendix A. Thus, the testimony of these expert tax practitioners representing many years of experience in the criminal tax bar as well as their practice and contacts with tax practitioners throughout the United States clearly established that, as of 1976, the Government had a long-standing policy and practice of nonprosecution in tax voluntary disclosure cases. Further, this policy was uniformly practiced throughout the United States and directed and monitored by the highest ranking officials of the Internal Revenue Service, Justice Department and Treasury Department. Indeed, attorney and certified public accountant, Walter Brown, one of Mr. Hebel's counsel testified not only as to the longstanding practice but also to

the understanding of the governmental policy by IRS officials. He related statements made directly to him in 1969 by Mr. Paul Powers, then Chief of Audit for the Internal Revenue Service, Des Moines, Iowa. Mr. Brown indicated that in discussing a voluntary disclosure case with Mr. Powers, Mr. Powers confirmed that while there wasn't any written practice anymore, ". . . we all know that they don't prosecute voluntary disclosure cases." While counsel is aware of the fact that individual agents cannot necessarily bind the Government to a particular policy, Mr. Powers' statement to Mr. Brown simply indicates how widespread and accepted the policy of nonprosecution of voluntary disclosure cases has been throughout both the Government and the tax bar. Appendix A, p. 149.

Additionally, high government officials in both the Justice Department and the IRS knew about and encouraged the tax bar and accounting practitioners to accept the continuing validity of the Government's policy of nonprosecution in voluntary disclosure cases. See, generally, Appendix A, pp. 69-74.

This recital of the testimony received at the April 22, 1981 hearing should be sufficient to point out that individuals who made voluntary disclosures simply were not prosecuted for alleged tax crimes in the past. This position is so firmly established that the District Court found in its adopted report (with the Recommendation relating to the April 22, 1981 hearing) (Appendix B, p. 5) that, " . . . there appears to have been few, if any prosecutions of true voluntary disclosures . . . ."

Thus, the Court itself in effect found that the Petitioners had been prosecuted while others similarly situated had not been prosecuted (although the Court went on to state that it felt the Defendants failed to meet either prong of the test).

Both the government and the District Court acknowledged that the government did not provide the Court with the criterion used to select Mr. Hebel and Mr. Merritt for prosecution while no others had been prosecuted. The policy or basis upon which the Petitioners were selected for prosecution is known only to the individuals heading the governmental agency that sought this prosecution. This information is solely and uniquely within their possession. Holding this confidential information and yet choosing not to introduce any evidence at the evi-

dentiary hearing is patently unfair. Indeed, the Government resisted all efforts by the Petitioners to obtain this information. The apparent claim submitted to the courts below was that the Petitioners may not maintain their claim of selective prosecution because they cannot tell this Court what is known only to the governmental agencies and which the agencies have refused to divulge. Fortunately, the Ninth, Fourth and Seventh Circuit Courts of Appeal have recognized the injustice of this approach in their decisions of Steele, supra, Falk, supra, and Crowthers, supra, respectively.

In this case the government, at its peril, has chosen not to come forward and disclose the basis or policy for selecting the Petitioners for prosecution. By virtue of the decision of the

government to proffer no testimony or evidence of items uniquely in its possession, Petitioners should prevail on the discriminatory prosecution issue.

B. In this case the United States Court of Appeals for the Eighth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

The United States Supreme Court recognized in 1963 that one of the issues raised in this case was an important question of federal law which had not yet been settled by the Court. The issue presented then and now is whether the use of evidence obtained by a federal agency from taxpayers who rely on a practice or policy of nonprosecution in cases of voluntary disclosure should be suppressed where that agency attempts to

utilize said information in a criminal prosecution against the same taxpayers in contravention of said policy?

In United States v. Shotwell Mfg. Co., 371 U.S. 341 (1963) the Defendants urged the Court to find that evidence obtained through voluntary a disclosure should have been suppressed in the criminal action against them. The Seventh Circuit Court of Appeals ruled in favor of the defendants on this issue. The United States Supreme Court dispensed with the case based upon a factual finding that the evidence could not be suppressed since fraud had possibly permeated the taxpayer's disclosure. However, the Court went on to make a number of observations which cast light upon what its ruling might have been had the disclosures been untainted.

In the Shotwell case the basis of the defendant's reliance was a Treasury Department policy which amounted to a representation that delinquent taxpayers could escape possible criminal prosecution by making voluntary disclosures prior to the time that any investigation of them had commenced. At page 348 the Court characterized the pre 1952 policy of nonprosecution as "nothing more than part of a broad administrative policy designed to accomplish the expeditious and economical collection of revenue by enlisting taxpayer cooperation in clearing up as yet undetected underpayments of taxes, thereby avoiding the delays and expense of investigation and litigation."

In the instant case however the Petitioners' expert witnesses' testimony

at the April 22, 1981 evidentiary hearing as was set forth above clearly established more than a "broad administrative policy" but an actual governmental practice of some 20 year standing.

The Court in Shotwell recognized that if a person who is accused or was suspected of a crime was promised immunity or leniency in return for a statement, his inculpatory statement would be the product of inducement and thus not an act of free will, supra, at 347-348. Certainly the facts in the present matter before the Court indicate even more grievous circumstances Mr. Hebel and Mr. Merritt, with no knowledge of any accusations or investigations, were led to believe that if they came forward they would not be prosecuted.

In addition to the claim by the Petitioners that the repudiation of the voluntary disclosure policy on the part of the government violated their constitutional rights under the Fourth Amendment the Petitioners further respectfully submit that the government's repudiation violated their rights to due process as as well the right to effective assistance of counsel guaranteed under the Sixth Amendment.

The very essence of procedural due process must be that individuals have notice of the policies and positions of governmental agencies, particularly in the realm of criminal prosecution. Notice must be given of any changes in such policy to the extent, at least, that it may be reasonably assumed that individuals may act in reliance on such

policies. Lambert v. California, 355 U.S. 225 (1957). In the case at bar, the evidence received by the trial court clearly indicated that the Petitioners acted in reliance upon what has been commonly known and established as the voluntary disclosure policy. The significance of this reliance is that the agencies of the United States government involved in the administration of this policy, particularly the Department of Justice and the Internal Revenue Service, have, without any form of notice, abrogated their policy. They have commenced prosecution of individuals who have justifiably relied upon safeguards supposedly inherent in voluntary disclosure.

This case represents one of the first, if not the first case, in the past 24 years in which any individual

who has voluntarily disclosed previous tax irregularities has been subjected to criminal prosecution. The record in this case stands silent as to any notice which was given to either of the Petitioners that on December 2, 1976, when the voluntary disclosure was made, the Internal Revenue Service and the Department of Justice had changed its long-standing practice and would then commence prosecution of those voluntarily disclosing earlier tax problems. The failure to treat the Petitioners with the highest degree of equity and conscience, as is required by the due process clause of the Fifth Amendment mandates that the verdict of guilty rendered against them be reversed as the trial court should have dismissed the indictments.

Finally, a claim of violation of one's Sixth Amendment right to counsel traditionally involves an allegation of some form of omission committed by counsel for a defendant in a criminal prosecution. The issue before this Court differs substantially from the traditional right to counsel objection. The question here asks whether the practicing bar, including counsel for the Petitioners, have been led by action, passage of time, and inaction of the government, into believing that a voluntary disclosure would result in nonprosecution and thereby cause lawyers to advise clients to come forward with their transgressions and forego procedures safeguarded by the Fourth and Fifth Amendments to the Constitution. Simply put, has the government participated in a deception of

the bar resulting in the destruction of the Sixth Amendment right to effective assistance of counsel?

The Sixth Amendment provides that the Petitioners shall enjoy the right to have the assistance of counsel for their defense. This fundamental right of our system of justice is meant to assure fairness in the adversary criminal process. United States. v. Morrison, _____ U.S. _____, 101 S.Ct. 665, 667 (1981); Gideon v. Wainwright, 372 U.S. 335, 344 (1963). This concept of fairness has been abrogated in this case because of the conduct of the government in holding out this policy of nonprosecution. The end result of these acts has been that the government has rendered counsel's assistance to the Petitioners ineffective, thereby depriving Peti-

tioners of their rights under the Sixth Amendment. Pretrial acts of the Court have been found to deny a defendant assistance of counsel in the cases of Geders v. United States, 425 U.S. 80 (1976) and Powell v. Alabama, 287 U.S. 45 (1932). The executive branch of government and its agencies should be held to no lesser standard than that imposed on the judiciary.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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COUNSEL FOR PETITIONERS

Appendix

81-1783

No. _____

Supreme Court, U.S.
FILED
MAR 23 1982
ALEXANDER L. STEVAS
CLERK

In The

Supreme Court of the United States

October Term, 1982

Richard Hebel and Carlyle Merritt,

Petitioners,

v.

United States of America,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX FOR PETITION FOR CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	NO. CR 81-3001
Plaintiffs,	)	
vs.	)	REPORT AND RECOMMENDATION
RICHARD HEBEL and CARLYLE MERRITT,	)	
Defendants.	)	

This matter is before the United States Magistrate pursuant to the order of reference filed April 10, 1981. Hearing was held on the motion on April 22, 1981 and final briefs submitted on May 1, 1981. After consideration of the briefs and testimony at the hearing the court makes the following findings of fact and recommendations:

FINDINGS OF FACT

1. During the period relevant to this action defendant Richard F. Hebel was an officer and majority stockholder

of Hebel Fertilizer and Chemical, Inc., and defendant Carlyle Merritt was an officer and minority stockholder of the same company.

2. Timely Federal Income Tax returns were filed by defendants personally for calendar years 1974 and 1975 and for the corporation for the fiscal years during 1974, 1975 and 1976.

3. On Friday, November 26, 1976 defendants contacted Edward Boyle, who had represented them in the past regarding a problem with H. Jerome True who was a stockholder of Hebel Fertilizer & Chemical, Inc. A meeting was arranged between defendants, Boyle, True and his attorney for later that afternoon.

4. Prior to the meeting with True and his counsel, defendants met with Mr. Boyle. The initial matter taken up at

this time was a disclosure to Mr. Boyle of possible irregularities in defendants' Federal Tax Returns. Defendants appeared unusually nervous at this time and the matter of possibly making a volunatry disclosure was discussed briefly. Ultimately Boyle advised defendants that they should consult a tax specialist for advice on this problem.

5. At approximately 2:00 p.m. on November 26, 1976 defendants met with True and his attorney in defendant Hebel's office. The filing of a lawsuit by True against defendants was discussed at this meeting. It was apparent from the copy of the petition supplied by True at this meeting that its filing would bring to light certain irregularities in defendants' tax returns. Settlement of the lawsuit was also discussed at this time, however no agreement was reached,

but Boyle was allowed a week to consider the matter before the petition would be filed. On December 3, 1976 Boyle contacted True's attorney and rejected the offer of settlement. The action was filed by True later that day.

6. On November 26, 1976, Mr. Walter R. Brown and Mr. William Sidney Smith, who are both experienced tax counsel, were contacted regarding their representation of defendants in connection with these tax problems. Defendants first met with Messrs. Smith and Brown at Mr. Smith's office in Des Moines, Iowa on November 30, 1976. At this point an independent accountant was also engaged in connection with these matters.

7. On December 1, 1976 another meeting was held between defendants, Boyle, Smith and Brown. At this time neither defendants nor their attorneys

were aware of any examination having been commenced by the Internal Revenue Service relating to the Federal Income Tax returns of the defendants or of any corporate returns of Hebel Fertilizer & Chemical Inc. Defendants were advised at this meeting that they should file amended returns with the Internal Revenue Service to correct what appeared to be substantial errors in the correct reporting of taxable income by defendants and Hebel Fertilizer & Chemical Inc.

8. Messrs. Smith and Brown advised defendants that based upon their experience in the tax area that while the Internal Revenue Service and Justice Department had publicly stated in 1952 that they would no longer assure taxpayers of non-prosecution where a voluntary disclosure of previous tax errors was made, that it had been counsels'

experience that prosecution would not result where a true voluntary disclosure was made.

9. Based upon this advice defendants requested counsel to disclose to the Internal Revenue Service that apparently errors existed in their income tax returns. Pursuant to these instructions counsel informed the Internal Revenue Service on December 2, 1976 of the defendants' identities and that there appeared to be substantial tax deficiencies on defendants' individual returns as well as those of Hebel Fertilizer & Chemical, Inc. for the years at issue. At this time neither defendants nor counsel was aware of any pending investigations involving defendants.

10. At the time the disclosure was made to Robert J. Moeller, acting Chief of the Internal Revenue Service Audit

Division, and Jack L. Schroeder, Chief of Internal Revenue Service Branch I counsel were advised that defendants' returns had previously been referred to a Revenue Agent for audit.

11. Defendants provided a complete and absolute disclosure of any and all transactions which may have had tax ramifications for the years at issue to his counsel and to the CPAs engaged by counsel. At the conclusion of the independent audit defendants caused amended individual and corporate tax returns to be prepared. These amended returns were filed on December 27, 1976 and the tax due of approximately $200,000 was paid.

12. Subsequent to filing the amended returns, defendants supplied the IRS with detailed identification of the location, amounts, time periods and occasions of the then determined inaccuracies in

defendants' tax returns by allowing the IRS to examine and make copies of extensive accounting workpapers and produced by the accounting firm working for defendants' counsel. Defendants also provided access to their original records and were interviewed by the IRS regarding their tax returns.

13. Defendants were indicted on February 24, 1981.

14. Prior to the disclosure by defendants the IRS had the following information available to it and had taken the following steps:

a. On January 8, 1976, an anonymous person telephoned the Mason City, Iowa Internal Revenue Service stating that Dick Hebel had been using corporate funds for personal expense, such as his home with a swimming pool as well as building an addition onto his father-in-law's house.

b. On Feburay 11, 1976, Jess Harris, Internal Revenue Agent, Mason City, sent a memorandum to

his group manager suggesting that an audit of Richard Hebel, Hebel Fertilizer & Chemical, Inc. and Hebel Grain International Ltd. be started soon due to a complaint received concerning Hebel's use of business funds for personal use.

c. On May 14, 1976, the Form 1120 for the fiscal year ended January 31, 1975 for Hebel Fertilizer & Chemical, Inc. was classified and assigned to Jess Harris for audit as a result of a Code 420 computer selection for audit, and not as a result of any informant information. On June 22, 1976, Richard Hebel's Form 1040 was assigned, all as a result of the same process as above and not as a result of Jess Harris' memorandum. Harris intended to open his audit of the above on December 27, 1976.

d. On November 19, 1976, Audit Group Manager Otten interviewed former Hebel employee, Dean Linde (as a result of Mr. Linde coming into the Internal Revenue Service office that day), who provided information concerning Richard Hebel's recordkeeping for tax purposes, expenditures of business funds for personal use and other information suggesting that Hebel's tax returns were not correct.

15. Defendants' disclosures were voluntarily made in reliance upon the advice of counsel but with knowledge that, while it was counsel's belief that they would not be prosecuted, there was no absolute grant of immunity from prosecution.

In light of the fact that the IRS publicly abandoned its voluntary disclosure policy in 1952 and defendants and their counsel were aware of this, the court is of the view that defendants' disclosures were knowingly and voluntarily made and accordingly all motions should be denied, alternatively, if a voluntary disclosure policy should be found to exist there appears to be a serious question as to whether defendants' disclosure was in fact a true voluntary disclosure.

Specifically, defendants have moved

to dismiss the indictment against them under the due process clause of the fifth amendment to the United States Constitution based upon lack of notice, failure to comply with the Administrative Procedure Act, equitable estoppel and selective prosecution.

The record appears to be relatively clear that the IRS and Department of Justice followed a written policy of not prosecuting criminally, taxpayers who made voluntary disclosures or irregularities in their tax returns during the period between 1934 and 1952. However, this policy was abandoned in 1952 and from that time until the present it has been the announced policy fo the IRS that a voluntary disclosure would be considered along with all other facts and circumstance of a case in determining

whether or not criminal charges would be filed. See generally, United States v. Shotwell Mfg. Co., 355 U.S. 233, 235 n. 2 (1957); United States v. Choate, 619 F.2d 21 (9th Cir. 1980). Since counsel was aware of this change in policy and advised defendants of the change, defendants arguments based upon lack of notice and under the APA must fail. In this regard, defendants argue that while no written policy existed there was an unwritten practice of not prosecuting taxpayers who made a voluntary disclosure. The simple answer to this is defendants have failed to establish the existence of such a practice. While there appears to have been few, if any, prosecutions of true voluntary disclosures the IRS has consistently reserved the right to do so. Indeed, the position

is recognized by the legal publications submitted by the government and at best there appears to be disagreement among the bar as to the possibility of prosecution.

Likewise, defendants' estoppel argument must fail for want of a factual base since the record contains no evidence of affirmative acts by the government which could have misled defendants or upon which they could have reasonably relied.

Further defendants' motion based upon selection prosecution is without merit. To prevail on this motion defendants must show both that he was singled out for prosecution and that the prosecution was based upon impermissible grounds. See e.g., United States V. Larson, 612 F.2d 1301 (8th Cir. 1980); United States v. Catlett, 584 F.2d 864 (8th Cir. 1978);

United States v. Alarik, 439 F.2d 1349 (8th Cir. 1971) Here, defendants have failed to meet either prong of the test. In light of the amount of tax due and the status of the IRS's investigation at the time of disclosure, the record shows ample reason for prosecuting defendants. Further, defendants have been unable to raise any colorable claim of improper motive.

Finally, defendants' motion to suppress must likewise be denied. It is well recognized that the government must establish guilt by evidence independently secured and not by evidence obtained as a result of trickery or coercion from defendants, Rogers v. Richmond, 365 U.S. 534 (1960). Further, this principal clearly includes evidence induced from a person under a governmental promise,

either direct or implied, of immunity, Bram V. United States, 168 U.S. 532 (1857). Here, however, the record does not support a finding that defendants' disclosures were brought about as a result of any government conduct. Rather, it does support a finding that all disclosures were freely made by defendants in hope that they would not be prosecuted rather than in reliance upon any governmental promise of immunity.

Indeed, as noted above, the government has withdrawn its policy of non-prosecution of voluntary disclosures and this fact was known to counsel and related to defendants. Further, there is no evidence of any acts on the part of the government which could be considered calculated to lead defendants to believe that the practice was any different from

the stated policy. Indeed, this record reveals that the IRS and its officials have consistently maintained that prosecution was a possiblity in voluntary disclosure cases. Finally, defendants have produced no evidence of direct promises or inducments made to defendants or counsel during the proceedings.

Finally, in passing the court would note that there appears to be a question of whether, assuming a voluntary disclosure policy continued to exist, this disclosure in this case was in fact a true disclosure. In this regard, the court would note that defendants' Exhibit B and E seem to require the disclosure to have been made before an investigation had been initiated by the IRS. Under the prior practice a body of authority had held that an investigation

would be considered to be initiated at the time an agent was assigned to the case. See e.g., Monroe v. United States, 215 F.2d 81 (5th Cir. 1954); United States v. Levy, 99 F.Supp. 529 (D. Conn. 1957); under this defeinition an investigation woul dhave been initiated prior to the disclosure.

In addition there would also appear to be a question of whether the IRS was in possession of sufficient information at the time of disclosure to make prosecution virtually certain and hence making the disclosure untimely.

It is therefore the recommendation of this court that defendants' motions be denied. It is further recommended that should a further hearing be held in this matter that defendants be allowed to secure the oral testimony of the repre-

sentatives of the IRS who have been authorized to testify under the subpoenas issued in this case.

May 5, 1981.

/s/ James D. Hodges
James D. Hodges, Jr. Magistrate
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1910

United States of America,

Appellee,

v.

Richard Hebel,

Appellant.

No. 81-1911

United States of America,

Appellee,

v.

Carlyle Merritt,

Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA.

Submitted: December 17, 1981
Filed: January 22, 1982

Before HEANEY, BRIGHT, and ROSS, Circuit Judges. PER CURIAM.

Carlyle Merritt and Richard Hebel appeal from single-count convictions for criminal violation of the income tax laws. In a bench trial on stipulated facts the district court[1] found Merritt guilty of knowingly and willfully subscribing his 1975 income tax return which failed to report his true income. The count convicted Merritt of violating 26 U.S.C. § 7206(1), and fined him $5,000. At the same bench trial, the district court found Hebel guilty of income tax evasion for calendar year 1975, in violation of 26 U.S.C. § 7201, and fined him $10,000. We affirm.

Merritt and Hebel do not dispute these violations on appeal. Each tax-

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[1] The Honorable Edward J. McManus, Chief Judge, United States District Court for the Northern District of Iowa.

payer voluntarily disclosed his filing of a false return to the Internal Revenue Service, corrected the tax discrepancies in an amended return, and paid the appropriate tax due. They contend, however, that an IRS practice of not prosecuting persons who make such voluntary disclosures bars their prosecution.

Based on this alleged practice of the IRS, appellants assert the following issues on appeal:

1) That the trial court erred in finding that defendants had not established a governmental practice not to prosecute voluntary disclosure tax cases and therefore erred in denying the motions to enjoin their indictments, and motions to dismiss and suppress;

2) That the trial court erred in denying dismissal on grounds of selective prosecution; and

3) That these prosecutions violated due process and denied taxpayers effective assistance of counsel because their attorneys counseled them to make

disclosure of the facts concerning their tax delinquencies in reliance upon the policy and practice of the Government not to prosecute taxpayers who voluntarily disclose tax falsifications.

The district court initially referred these matters to Magistrate James D. Hodges, Jr., to hear and make recommendations concerning defendants' motions to suppress evidence and to dismiss the prosecutions. After an evidentiary hearing, the magistrate made the following findings:

> 8. Messrs. Smith and Brown [experienced tax lawyers] advised defendants that based upon their experience in the tax area that while the Internal Revenue Service and Justice Department had publicly stated in 1952 that they would no longer assure taxpayers of non-prosecution where a voluntary disclosure of previous tax errors was made, that it had been counsels' experience that prosecution would not result where a true voluntary disclosure was made.
>
> 9. Based upon this advice defendants requested counsel to disclose to the Internal Revenue

Service that apparently errors existed in their income tax returns. Pursuant to these instructions counsel informed the Internal Revenue Service on December 2, 1976 of the defendants' identities and that there appeared to be substantial tax deficiencies on defendants' individual returns as well as those of Hebel Fertilizer & Chemical, Inc. for the years at issue. At this time neither defendants nor counsel was aware of any pending investigations involving defendants.

10. At the time the disclosure was made to Robert J. Moeller, acting Chief of the Internal Revenue Service Audit Division, and Jack L. Schroeder, Chief of Internal Revenue Service Branch I counsel were advised that defendants' returns had previously been referred to a Revenue Agent for audit.

11. Defendants provided a complete and absolute disclosure of any and all transactions which may have had tax ramifications for the years at issue to his counsel and to the CPAs engaged by counsel. At the conclusion of the independent audit defendants caused amended individual and corporate tax returns to be prepared. These amended returns were filed on December 27, 1976 and the tax due of approximately $200,000 was paid.

12. Subsequent to filing the amended returns, defendants supplied the IRS with detailed identification of the location, amounts, time periods and occasions of the then determined inaccuracies in defendants' tax returns by allowing the IRS to examine and make copies of extensive accounting workpapers and produced by the accounting firm working for defendants' counsel. Defendants also provided access to their original records and were interviewed by the IRS regarding their tax returns.

13. Defendants were indicated on February 24, 1981.

* * * *

15. Defendants' disclosures were voluntarily made in reliance upon the advice of counsel but with knowledge that, while it was counsel's belief that they would not be prosecuted, there was no absolute grant of immunity from prosecution.
[United States v. Hebel and Merritt, No. CR 81-3001 (N.D. Ia. May 5, 1981 at 2-4) (magistrate's report and recommendation).]

In considering the motions to suppress and dismiss, Magistrate Hodges reviewed the same factual matters

asserted in this appeal. His opinion stated in part:

> In light of the fact that the IRS publicly abandoned its voluntary disclosure policy in 1952 and defendants and their counsel were aware of this, the court is of the view that defendants' disclosures were knowingly and voluntarily made and accordingly all motions should be denied, alternatively, if a voluntary disclosure policy should be found to exist there appears to be a serious question as to whether defendants' disclosure was in fact a true voluntary disclosure.
>
> Specifically, defendants have moved to dismiss the indictment against them under the due process clause of the fifth amendment to the United States Constitution based upon lack of notice, failure to comply with the Administrative Procedure Act, equitable estoppel and selective prosecution.
>
> The record appears to be relatively clear that the IRS and Department of Justice followed a written policy of not prosecuting criminally, taxpayers who made voluntary disclosures of irregularities in their tax returns during the period between 1934 and 1952. However, this policy was abandoned in 1952 and from

that time until the present it has been the announced policy of the IRS that a voluntary disclosure would be considered along with all other facts and circumstance of a case in determining whether or not criminal charges would be filed. See generally, United States v. Shotwell Mfg. Co., 355 U.S. 233, 235 n. 2 (1957); United States v. Choate, 619 F.2d 21 (9th Cir. 1980). Since counsel was aware of this change in policy and advised defendants of the change, defendants arguments based upon lack of notice and under the APA must fail. In this regard, defendants argue that while no written policy existed there was an unwritten practice of not prosecuting taxpayers who made a voluntary disclosure. The simple answer to this is defendants have failed to establish the existence of such a practice. While there appears to have been few, if any, prosecutions of true voluntary disclosures the IRS has consistently reserved the right to do so. Indeed, the position is recognized by the legal publications submitted by the government and at best there appears to be disagreement among the bar as to the possibility of prosecution.

* * * *

Further, defendants' motion based upon selection [sic] prosecution is without merit. To prevail on this motion defendants must show both that he was singled out for prosecu-

tion and that the prosecution was based upon impermissible grounds. See e.g., United States v. Larson, 612 F.2d 1301 (8th Cir. 1980); United States v. Catlett, 584 F.2d 864 (8th Cir. 1978); United States v. Alarik, 439 F.2d 1349 (8th Cir. 1971)[.] Here, defendants have failed to meet either prong of the test. In light of the amount of tax due and the status of the IRS' investigation at the time of disclosure, the record shows ample reason for prosecuting defendants. Further, defendants have been unable to raise any colorable claim of improper motive.

Finally, defendants' motion to suppress must likewise be denied. It is well recognized that the government must establish guilt by evidence independently secured and not by evidence obtained as a result of trickery or coercion from defendants, Rogers v. Richmond, 365 U.S. 534 (1960). Further, this principal clearly includes evidence induced from a person under a governmental promise, either direct or implied, of immunity, Bram v. United States, 168 U.S. 532 (1857). Here, however, the record does not support a finding that defendants' disclosures were brought about as a result of any government conduct. Rather, it does support a finding that all disclosures were freely made by defendants in hope that they would not be prosecuted rather than in reliance upon any governmental promise of immunity.

> Indeed, as noted above, the government has withdrawn its policy of non-prosecution of voluntary disclosures and this fact was known to counsel and related to defendants. Further, there is no evidence of any acts on the part of the government which could be considered calculated to lead defendants to believe that the practice was any different from the stated policy. Indeed, this record reveals that the IRS and its officials have consistently maintained that prosecution was a possibility in voluntary disclosure cases. Finally, defendants have produced no evidence of direct promises or inducements made to defendants or counsel during the proceedings. [United States v. Hebel and Merritt, supra at 4-7 (magistrate's report and recommendation).]

The magistrate recommended denial of the motions, and the district court accepted that recommendation. Thereafter, the trial proceeded before the district court upon facts stipulated by the parties subject to reserved objections. The district court found each defendant guilty on one count of a

multiple indictment. On appeal, the defendants attack the findings and rulings denying dismissal of the indictments and suppression of the evidence.

We agree with the district court. The magistrate's findings, which are supported by the evidence, demonstrate that no governmental policy or practice on voluntary disclosure relating to false tax returns necessarily relieves taxpayers who file false tax returns from criminal prosecution. The prior existence of that policy and its abandonment came to the attention of the Supreme Court in United States v. Shotwell Manufacturing Co., 355 U.S. 233 (1957). The Court noted:

> Under that policy, first announced by the Treasury Department in 1945, the Department did not refer to the Department of Justice for prosecution cases of intentional income

> tax evasion where the taxpayers had made a clean breast of things to the Treasury before any investigation had been initiated by the Revenue Service. This policy was set forth in various informal announcements by Treasury officials, but was never formalized by statute or regulation. The policy was abandoned in January 1952. [Id. at 235 n.2.]

As of 1973, the Treasury Department's "voluntary disclosure policy" read as follows:

> The Treasury Department on January 10, 1952, formally abandoned its long-standing "voluntary disclosure policy". Treasury Department Information Release, No. S-2930; 1955 P-H, par. 18, 604-A. It is, therefore, no longer an administrative basis for declining prosecution in the Revenue Service that a prospective defendant voluntarily revealed his tax fraud to an appropriate official of that Service before any investigation of his affairs had begun. * * * Now the fact that a taxpayer seeks voluntarily to rectify a false return without prodding by investigators or the threat of investigation is given some weight in determining whether to prosecute but is not conclusive of the issue. [U.S. Department of

Justice Manual for Criminal Tax Trials, Ch. 1, p.5.]

In an earlier civil case brought by Hebel to enjoin his prosecution, the same district court noted the Treasury Department's 1973 position. Hebel v. United States Department of Justice, Nos. C 80-155, C 80-156 (N.D. Ia. Feb. 18, 1981). See also United States v. Choate, 619 F.2d 21, 23 (9th Cir. 1980).

In this case, taxpayers Hebel and Merritt received a substantial benefit from disclosing and rectifying past errors. The indictment consisted of seven counts, three counts each charging Hebel and Merritt individually, and one count charging them both. Each defendant was convicted on only one count, and neither received a sentence of imprisonment.

Regardless of whether a taxpayer actually benefits or suffers detriment from voluntarily disclosing and rectifying faulty tax returns, that disclosure itself does not insulate the taxpayer from prosecution under any administrative policy or practice recognized by this court. Taxpayers and their attorneys cannot rely on a long-since abandoned policy of non-prosecution when a taxpayer voluntarily discloses violation of the tax laws. Accordingly, we affirm the convictions of Hebel and Merritt on the basis of the magistrate's findings and opinion, adopted by the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT.